NKM DEVELOPMENT SDN. BHD.

v.

IREX SDN. BHD.

HIGH COURT MALAYA, KUALA LUMPUR
VC GEORGE J
[COMPANIES WINDING-UP NO. 157 OF 1984]
22 JANUARY 1985

COMPANY LAW: *Winding-up - Petition for winding up respondent company - Respondent company indebted to petitioners - Unable to pay debts - Respondent company applied for petition to be struck off or dismissed - Ground to strike off or dismiss petition - Order 18 r. 19(1)(d) RHC 1980 - Abuse of process of Court - Debt being disputed - Petitioners have filed civil suit against directors of respondent company for "RM250,000" - Whether issue to strike off be considered at actual hearing of petition or on the respondent company's application.*

The petitioners on 21 December 1984 presented to the Court the petition to wind up the respondent company pursuant to s. 218(1)(e) of the Companies Act 1965 which provides that the Court may wind up a company if it is unable to pay its debts. The petitioners contended that the respondent company was indebted to them in the sum of RM250,000 "being a loan due to the petitioners as at 22 December 1979 together with interest thereon at 12% per annum until date of payment". However, the respondent company applied to have the petition struck off or dismissed pursuant to O. 18 r. 19(1)(d) of the Rules of the High Court 1980 being that, the petition was an abuse of the process of Court and pursuant to the inherent jurisdiction of the Court.

Held:

[1] The Court was more than satisfied that the alleged debt on which the petition was founded was disputed and on substantial grounds.

[2] The petition must fail for the same reasons as that of Megarry J for coming to a similar conclusion in the case of *Re Lympne Investments Ltd.* The petition was accordingly struck off and dismissed with costs.

[Petition struck off and dismissed with costs.]

Cases referred to:
Re St. Piran Ltd. [1981] 3 All ER 270
Re Lympne Investments Ltd. [1972] 2 All ER 385

Legislation referred:
Companies Act 1965, ss. 218(1)(e), 218(2)(a)
Rules of the High Court 1980, O. 18 r. 19(1)(a), (d), (3)

Other sources referred to:
White Book, 1982, 18/19/2

For the applicants/respondent company - T. Thomas; M/s. Skrine & Co.
For the petitioners - George C. Proctor; M/s. Moghan & Co.

JUDGMENT

VC George J:

[On encl. (23)]

On 21 December 1984 NKM Development Sdn. Bhd. presented to the Court the petition herein to wind-up Irex Sdn. Bhd. (the Company). The relevant Senior Assistant Registrar apparently was prevailed upon to allot 10 January 1985, an early date indeed, for the hearing of the petition.

The petitioners relied on s. 218(1)(e) of the Companies Act which provides that the Court may wind-up a company if it is unable to pay its debts. In para. 4 of the petition it was contended that the company was indebted to the petitioners in the sum of RM250,000 "being a loan due to the petitioners as at 22 December 1979 together with interest thereon at 12% per annum until date of payment".

According to the clerk of the petitioners' solicitors a statutory demand as prescribed by s. 218(2)(a) for the repayment of the alleged loan and interest was pursuant to the said s. 218(2)(a) duly served on the company on 13 November 1984 by his leaving it in the letter box at the registered office of the company because he had found the office locked. The petitioners said that in spite of the said demand the Company had neglected to pay the amount claimed or to secure or compound for it within the three weeks prescribed by the sub-section or at all and accordingly invoked the presumption provided by the sub-section that the company shall be deemed to be unable to pay its debts. For the Company it was said that they had never received the letter of demand but there was no challenge to the alleged service of the letter of demand.

The petition itself was served on 26 December 1984 by leaving it with a woman the process server found at the registered office of the company. Apparently attempts to effect service were made earlier on 22 and 24 December respectively when the registered office of the Company was found locked.

The petitioners caused the notice of hearing of the petition to be advertised in the Star newspaper of 24 December 1984. The Company has complained that the petitioners had also caused the Star newspaper to publish on Christmas Day "an article with a large heading entitled NKM Holdings gets winding-up petition against Irex". The newspaper article does indeed give credit for the information on which it was based to a "spokesman" of the petitioners and the petitioners have not denied the allegation that it was they that had caused the story to be published. However, since the Company had indicated that it may sue "the petitioner, its directors and officers and its solicitors for defamation in a separate legal action", I restrain myself from commenting on the contents of the article and that it was published and that it had been caused to be published but not before observing that some very loose language indeed was used in it.

The Company invoking O. 18 r. 19 of the Rules of the High Court and the inherent jurisdiction of the Court, took out a motion to have the petition struck off or dismissed. An early date of the hearing of the motion was sought for and obtained. It was fixed for hearing on 31 December 1984.

Encik George Proctor on behalf of the petitioners had argued that the issue of whether the petition should be dismissed should only be considered at the actual hearing of the petition. Encik T. Thomas disagreed as I also did. Order 18 r. 19(3) explicitly provides that the jurisdiction given by O. 18 r. 19(1) applies to a petition as if the petition is a pleading. Applications to strike out pleadings (and a *fortiori* petitions), should be made promptly. See

1982 *White Book* 18/19/2 and *Re St. Piran Ltd.* [1981] 3 All ER 270 at 273b.

The ground relied on by the company was that provided by O. 18 r. 19(1)(d) that the petition was an abuse of the process of Court in support of which evidence may be submitted and affidavits may be read - I had also overruled Encik George Proctor's contention that by O. 18 r. 19(2), the application should be disposed of without the Court reading the affidavit filed in support thereof. Order 18 r. 19(2) applies only to a reliance on r. 19(1)(a) where the ground is that the pleading does not disclose a reasonable cause of action.

The secretary of the company, Felix Tan Soon Kim in his affidavit in support of the motion denied the contention that the company was indebted to the petitioners. He then went on to draw the attention of the Court to the statement of claim in a civil suit being Kuala Lumpur High Court Civil Suit No. C469 of 1983 brought by the petitioners as plaintiffs against one Paw Swee Choo and one Choo Yoon Seong as defendants. Felix Tan drew attention to the statement of claim in particular to paras. 7, 11 and 16 which are as follows:

> 7. On 22 December 1979 the defendants signed a 'cash' cheque for RM250,000. According to the vouchers the stated purpose was a loan to Irex Sdn. Bhd. of No. 32, Jalan Jelutong, Damansara Heights, Kuala Lumpur.
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> 11. On 12 March 1982 the plaintiff company wrote to Irex Sdn. Bhd. demanding repayment of the purported loan and interest thereon. On 19 March 1984 Irex Sdn. Bhd. through their Solicitors, M/s. Skrine & Co. denied having received from the plaintiff company a loan of RM250,000 whether on 22 December 1979 or at any other time.
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> 16. The plaintiff claims that the 1st defendant being a Director of the plaintiff company cashed the said cheque and consequently received the amount of RM250,000 as trustee for and on behalf of the plaintiff company and is thereby liable to account to same for its use. As the purported loan to Irex Sdn. Bhd. never took place the 1st defendant improperly received the company monies and has failed to render any or any sufficient account of the said monies.

It turned out that the RM250,000 referred to in the petition as being a loan to the company was the very RM250,000 referred to in the said civil suit claimed therein as money had and received by the said Paw Swee Choo! Felix Tan contends that in the premises the petition is founded "not only on a disputed debt, but in fact on a debt which is untrue as shown by the abovementioned paragraphs of the petitioners' own statement of claim in the abovementioned civil suit". Felix Tan went on to say that as in fact there was no debt the Company did not make any payment to the petitioners and for the Company it has been contended that in the circumstances it cannot be said that the Company has neglected to pay the debt within the meaning of s. 218(2)(a) of the Companies Act. (See the passage quoted hereinafter from the judgment of Megarry J in *Re Lympne Investments Ltd.*). The petitioners have not sued the Company for the alleged debt and apparently the said action No. C469 of 1983 is still pending.

The chairman and managing director of the petitioners, N. Krishnamurthy, in his reply to Felix Tan's affidavit drew attention to what he described as a voucher dated 22 December 1979. He called it "the respondents' voucher", the respondents being the Company Irex Sdn. Bhd. He held out that voucher as evidence that a loan of RM250,000 was given to the company. He also contended that para. 18 of the statement of claim in the said action "clearly shows that a loan of RM250,000 was given to" the Company. The said para. 18 is as follows:

> 18. Further and in the alternative the plaintiff avers that the 1st and 2nd defendants in signing a cash cheque for a purported loan to Irex Sdn. Bhd. acted negligently and in breach of their duty towards the plaintiff company and the plaintiff has by reason of the said negligence and breach of duty sustained loss and damage.

The said voucher which was exhibited to Krishnamurthy's affidavit in fact turned out to be not the Company's voucher but that of the petitioners' and shows that it was for cash in the sum of RM250,000 said to be a temporary loan to Irex Sdn. Bhd. I noted that the voucher was not complete in that while it was designed to have the acknowledgment of the party receiving the money on the dotted line above the legend "received by", in fact there was no such acknowledgment. There was nothing on the face of the voucher to indicate that Irex Sdn. Bhd. had anything to do with it or had knowledge of it. I also failed to see that the said para. 18 of the statement of claim shows "clearly" as contended by Krishnamurthy, or at all that the loan of RM250,000 or any other amount had been paid to the respondents by the petitioners. Krishnamurthy says that Paw had approached the petitioners for an amicable settlement of the action and that in doing so she was acting on behalf of the Company Irex Sdn. Bhd. In apparent support of this contention, Krishnamurthy stated that Paw is an executive officer of Development and Commercial Bank in which Irex Sdn. Bhd. is one of the major shareholders. Against that is the affidavit of the secretary of Irex Sdn. Bhd. insisting that the allegation that the respondents had taken a loan from the petitioners had always been disputed.

I was more than satisfied that the alleged debt on which the petition was founded was disputed and on substantial grounds. I was of the opinion that the petition must fail for the same reasons that Megarry J gave for coming to a similar conclusion in the case of *Re Lympne Investments Ltd.* [1972] 2 All ER 385 where he said on p. 388 line i:

> It therefore seems to me that this petition must fail. A real dispute, turning to a substantial extent on disputed questions of fact which require *viva voce* evidence, and involving charges of fraud or near fraud, cannot properly be decided on petition. Nor is it right, or in accordance with the modern practice, to stand over the petition in order that the disputed issues may be resolved in other proceedings. That practice, I may say, seems to stem from *Re London & Paris Banking Corpn*. The Companies Court must not be used as a debt-collecting agency, nor as a means of bringing improper pressure to bear on a company. The effects on a company of the presentation of a winding-up petition against it are such that it would be wrong to allow the machinery designed for such petitions to be used as a means of resolving disputes which ought to be settled in ordinary litigation, or to be kept in suspense over the company's head while that litigation is fought out. Further, *Mann v. Goldstein*, cited with approval in the New Zealand Court of Appeal in *Bateman Television Ltd. v. Coleridge Finance Co. Ltd.*, provides authority for saying that when a petition is based on a debt which is disputed on substantial grounds, the petitioner is not a 'creditor' within s. 224(1) of the Companies Act 1948 who has the *locus standi* requisite for the presentation of the petition, even if the company is in fact insolvent. Again, the existence of a dispute on substantial grounds as to the existence of any debt defeats the contention that Lympne has, within the meaning of s. 223(a), 'neglected' to pay the sum required by the statutory notice: see *Re London & Paris Banking Corpn*. In the context of a notice requiring a person to do some act, I do not see how it can be said that the person 'neglects' to do that act if the reason for not doing it is a genuine and strenuous contention, based on substantial grounds, that the person is not liable to do the act at all. If there is liability, a failure to discharge that liability may well be 'neglect' whether it is due to inadvertence or obstinacy or dilatoriness; but a challenge to liability is a challenge to the foundation on which any contention of 'neglect' in relation to an obligation must rest. All these considerations point in the same direction, and accordingly I dismiss the petition.

The petition was struck off and dismissed with costs.

Also found at [1988] 1 CLJ 65